Before The
Federal Communications Commission
Washington, D.C 20544

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	**CC Docket No. 96-149**

REPLY COMMENTS OF AT&T CORP.

Pursuant to the Public Notice released on November 8, 2000, AT&T Corp. ("AT&T") respectfully submits these reply comments on the question whether interLATA information services are exempt from the interLATA services prohibition of Section 271 of the Communications Act.

The overwhelming majority of commenters agree that the Commission's prior holding that "interLATA information services" are "interLATA services" within the meaning of Section 271 was correct and should be reaffirmed. InterLATA information services contain a bundled interLATA telecommunications component, and a BOC that provides such services is "provid[ing] interLATA services" under Section 271(a).

As the commenters explain, all the traditional tools of statutory construction point to – indeed, compel – that conclusion. First, the D.C. Circuit held that interLATA information services were prohibited interexchange services under the MFJ (*see United States* v. *Western Elec. Co.*, 907 F.2d 160, 163 (D.C. Cir. 1990)), and the text of the Act shows that Congress codified that understanding by using precisely the same definitions of "information service" and

of "telecommunications" as did the MFJ (and an even broader definition of prohibited interLATA services).[1]

Second, the Commission's conclusion is further confirmed by other features of the Act's text and structure. In particular, Section 271(g) exempts certain specific interLATA information services from the interLATA services prohibition, and there would be no conceivable reason for Congress to exempt those particular services if interLATA information services were not otherwise covered by the prohibition.[2] In addition, as the Commission previously observed, Section 272(a)(2) refers separately to "interLATA telecommunications services" and "interLATA information services," and thus likewise indicates that "interLATA information services" are a subset of "interLATA services."[3]

Finally, a contrary interpretation would substantially undermine Section 271's purposes. A holding that interLATA information services were not prohibited "interLATA services" under Section 271 would open an "enormous loophole" in the prohibition (*United States* v. *Western Elec. Co.*, 907 F.2d at 163), would enable the BOCs to leverage their local monopolies into the interexchange market, and would diminish their incentive to open their local markets, satisfy the competitive checklist, and obtain approval under Section 271.[4]

For their part, the BOC commenters simply reiterate the arguments that Verizon and Qwest previously made in their D.C. Circuit brief. In particular, their comments, like their

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[1] *See* AT&T, pp. 3, 8-10; Information Technology Association of America ("ITAA"), pp. 3-5; Level 3, pp. 2-3; WorldCom, pp. 14-16.

[2] *See* AT&T, pp, 11-12; Commercial Internet Exchange, pp. 6-7; CompTel, pp. 5-6; ITAA, p. 8; WorldCom, pp. 2, 7-8.

[3] *See* AT&T, pp. 12-13; Comptel, p. 5; ITAA, pp. 8-9; Level 3, p. 2; WorldCom, pp. 2, 9-11.

[4] *See* AT&T, pp. 4-5, 19-21; ITAA, pp. 11-13; Level 3, pp. 4-7; WorldCom, pp. 16-17.

brief, place exclusive reliance on the Commission's 1998 Universal Service Report to Congress.[5] AT&T showed in its opening comments (pp, 16-20) why that reliance is misplaced, and demonstrated that the Report is irrelevant to the proper construction of Section 271.[6] Because the BOCs' comments simply recapitulate the arguments previously presented in their brief, AT&T was able to respond fully to their claims in its opening comments, and there is virtually nothing new to which to reply here. These reply comments will therefore be limited to three additional points.[7]

First, the BOCs repeatedly attack a strawman. They insist that "while an information service provider uses telecommunications to deliver its services, such use does not (and cannot) transform the information service into a telecommunications *service*."[8] That claim is correct, undisputed, and irrelevant to this proceeding. The Commission correctly held in the Report that a firm that provides information services does not thereby become a "telecommunications carrier," because the class of "telecommunications carriers" is limited to those that provide "telecommunications services," and a firm is not providing "telecommunications services" unless it operates as a common carrier.

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[5] *See* Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501 (1998) ("Report").

[6] Cox Communications, which does not take a position on whether interLATA information services are "interLATA services" for purposes of Section 271, filed comments for the "limited purpose" (p. 1) of urging the Commission to reaffirm the conclusion of that Report that the provision of an information service does not make a firm a regulated common carrier. AT&T agrees that the Report stated the law correctly in that respect, and no commenter takes a different position.

[7] In the event new arguments are raised by the BOCs in their own replies, AT&T will rely on the *ex parte* process to respond.

[8] *See* Verizon, pp 1-2 (emphasis added); *see also* Qwest, p. 2 ("When A BOC Provides Information Services, It Is Not Providing A Telecommunications *Service* . . . ") (emphasis

But the definition of "interLATA service" does not turn on whether a firm provides a "telecommunications service." Instead, "interLATA service" is defined as "telecommunications" across LATA boundaries. 47 U.S.C. § 153(21). InterLATA information services include "telecommunications" across LATA boundaries – indeed, the definition of "information service" states that it is provided "via telecommunications," 47 U.S.C. § 153(20) -- even though the provider is not providing a "telecommunications *service*" or otherwise acting as a common carrier.

Further, the BOCs also again note that the interLATA ban "applies . . . only when a Bell operating company or affiliate *'provides'* 'telecommunications'" across LATA boundaries, and the BOCs also again argue that the term "provide" must or should be given the same meaning under § 271 as it has been given under §§ 153(24), 153(26) and other provisions of the Act.[9] This claim is frivolous. The Commission and the D.C. Circuit have held that the term "provide" in § 271 must be construed in light of the unique terms, structure, history and purposes of the interLATA services ban and that "the differences in the statutory contexts justify different outcomes" under § 271 than under other sections of the Act. *U S West v. FCC*, 177 F.3d 1057, 1059-61 (D.C. Cir. 1999). Notably, the BOCs do not attempt to address the unique context of § 271, and the BOCs do not – and cannot dispute – that their proposed construction would defeat § 271's purposes by reducing or eliminating the BOCs' incentives to comply with the Act's market-opening requirements and creating the other evils that the ban seeks to prevent. That is why the DC Circuit held that this construction would create an "enormous loophole in the core restriction." *United States v. Western Electric Co.*, 907 F.2d at 163.

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added); BellSouth, p. 4 (citing cases that hold that Internet access and other information services are not "telecommunications services").

Second, in this regard, the BOCs also have no answer to Section 271(g). The Commission's Public Notice (p. 3) specifically asked about the relevance of Section 271(g), which exempts a few discrete interLATA information services from the interLATA services prohibition. The BOCs' responses are telling. The comments of Verizon and Qwest, the petitioners in the D.C. Circuit, simply ignore the question. BellSouth baldly states, without explanation, that "[n]othing can be reliably inferred from Section 271(g),"[10] but that is nonsense. The exemption of some interLATA information services from the interLATA restriction would be inexplicable if interLATA services were not otherwise within the scope of the prohibition, and the exemption is thus clear proof that Congress otherwise intended that such services be covered by the prohibition. And SBC's suggestion that Section 271(g) merely reflects "some extra, unnecessary assurance against any mistakenly expansive interpretation of the section 271(a) prohibition"[11] flies in the face of the settled principle of statutory construction that the words in a statute should *not* be construed to be "unnecessary" or "surplusage" (or as SBC put it, "extra"), but rather a statute should be construed "'to give effect, if possible, to every clause and word.'" *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955) (citation omitted); *see also Office of Consumers' Counsel* v. *FERC*, 783 F.2d 206, 220 (D.C. Cir. 1986); 2A Singer, *Statutes and Statutory Construction*, § 46.06 (6th ed. 2000). If, as SBC contends, Congress had included some interLATA information services in Section 271(g) simply in order "'to clarify what might be doubtful,'" SBC p. 5 (citation omitted) – i.e., whether interLATA information services are "interLATA services" – it obviously would have made its "clarification" by exempting all

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[9] *See* SBC, p. 2 (emphasis added).

[10] *See* BellSouth, p. 7.

[11] *See* SBC, p. 4.

interLATA information services, rather than just the few specific such services that are listed in Section 271(g).

Finally, virtually all commenters – including almost all of the BOCs – agree that it makes no difference under the statute whether the interLATA transmission is provided through owned or leased facilities.[12] Qwest, however, argues in the alternative that a carrier that leases interLATA transmission facilities might be deemed not to be providing interLATA services even if a carrier that owned the transmission facilities itself would be providing interLATA services.[13] The D.C. Circuit squarely rejected that claim. *See United States* v. *Western Elec. Co.*, 907 F.2d at 163. Qwest's reliance (p. 9) on the "contamination" theory in the Commission's *Computer II* orders is completely inapposite. That theory -- under which "certain VANs are treated as unregulated enhanced service providers because they offer enhanced protocol processing services in conjunction with otherwise basic transmission services"[14] – has literally nothing to do with any of the questions or statutory provisions at issue in this proceeding.

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[12] *See, e.g.*, BellSouth, p. 7 (it is irrelevant "[w]hether an information service provider uses its own telecommunications facilities or facilities purchased from a carrier"); SBC, p. 4 (no "room for a distinction based on whether the provider of information services also owns the underlying transmission facilities").

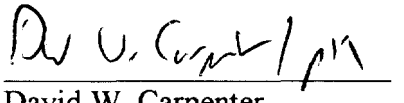
[13] *See* Qwest, pp. 8-10.

[14] *See* Supplemental Notice, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, ¶ 43 n. 52 (released June 16, 1986).

CONCLUSION

For the reasons stated, the Commission should reaffirm its *Non-Accounting Safeguards Order* and again hold that "interLATA information services" are "interLATA services" that BOCs cannot provide in their regions until they obtain Section 271 authority.

Respectfully submitted,



Mark C. Rosenblum
Stephen C. Garavito
AT&T Corp.
295 N. Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

David W. Carpenter
Peter D. Keisler
David L. Lawson
Sidley & Austin
One Bank Plaza
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Counsel for AT&T Corp.

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Service List

Johanna Mikes
Common Carrier Bureau
Policy and Program Planning Division
Federal Communications Commission
445 12th Street., S.W.
Room 5-C163
Washington, D.C. 20554

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street., S.W.
Room TW-B204
Washington, D.C. 20554

Carol Ann Bischoff
Competitive Telecommunications Association
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036

Robert J. Aamoth
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Ronald L. Plesser
Piper Marbury Rudnick & Wolfe LLP
1200 19th Street, N.W.
Washington, D.C. 20036

Russwel M. Blau
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

William P. Hunt III
Vice President and Regulatory Counsel
Level 3 Communications, Inc.
1025 Eldorado Boulevard
Broomfield, CO 80021

Blair A. Rosenthal
Qwest Communications International
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036

Theodore R. Kingsley
Bell South Corporation
Suite 1700
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610

J.G. Harrington
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036

Edward Shakin
Verizon
1320 North Court House Road
8th Floor
Arlington, VA 22201

Mark D. Schneider
Jenner & Block
601 Thirteenth Street, N.W.
Washington, D.C. 20005

Richard S. Whitt
WorldCom, Inc
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Jonathan Jacob Nadler
Squire, Sanders & Dempsey LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Richard J. Metzger
Focal Communications Corporation
7799 Leesburg Pike
Suite 850 North
Falls Church, VA 22043

Richard M. Rindler
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

Michael K. Kellogg
Kellogg, Huber, Hansen, Todd & Evans, PLLC
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036

Lori A. Fink
SBC Communications
1401 I Street, N.W., Suite 1100
Washington, D.C. 20005

International Transcription Services, Inc.
445 12th Street., S.W.
Room CY-B402
Washington., D.C 20554